Petitioner cites, p. 14, *Victoria Park Co. v. Continental Ins. Co.*, 39 Cal. App. 347, 178 Pac. 724. This case involved the destruction of property by fire. The proof of loss was not excepted to by the insurer, except that ten days after its receipt a letter was written plaintiff stating:

> "According to your documents we are criticising Section 'C' and we are also criticising the elimination of the date of the fire."

The Court held that the statement, "According to your documents we are criticising section 'C' and we are also criticising the elimination of the date of the fire," did not express any disagreement with the *amount* stated by the insured, either as to the whole or any part thereof. We cannot see how this case has any analogy to the present case, as obviously a statement "we are criticising section 'C'" is in no wise the equivalent of a statement of the amount of loss admitted on that item, or that no amount was admitted thereon.

In fact, the opinion of the court strongly implies that, no matter how inaptly worded, a notice informing the insured of the amount of loss admitted or that no loss whatsoever was admitted, would have been sufficient.

Plaintiff cites, page 12, *Lauman v. The Concordia Fire Ins. Co.*, 50 Cal. App. 609, 195 Pac. 951. This case again involved the destruction of specific property by a fire. The letter of disagreement merely stated that the company disagreed with the proof of loss because it failed to show any interest of the insured in the property damaged. This is entirely consistent with the company admitting that the *amount* of loss caused by the fire was exactly as claimed in the proofs.

This is particularly emphasized by the express statement of the court itself on page 620 as follows:

> "No objection is made in the letter to the amount of any loss, but it is based solely on the reason stated."

The court then points out that proof was made that the plaintiff had assumed liability for the goods destroyed and that no contention was made that the evidence was not sufficient to support the court's finding to that effect. Thus, the plaintiff fully met the only objection raised by respondents' letter of disagreement and, therefore, was obviously entitled to recovery.

The present case is exactly the reverse of the *Lauman* case. In the *Lauman* case there was a denial of any liability but no disagreement with the amount of loss claimed. In the present case there is no denial of liability, but there is a total disagreement with the amount of loss claimed and a statement that the amount of loss admitted on each item was nothing.

We submit that the *Lauman* case is not authority for the contentions of petitioner, but is strong inferential authority for the position of respondents, since the opening part of the letter of disagreement in the *Lauman* case is much less specific than is the letter involved in the present case, and yet in the *Lauman* case the letter itself was not held to be insufficient, but was merely held to limit the right of the respondents to rely upon the specific objections therein set forth.

The court held that *having limited its disagreement* with the claimed loss to certain specific reasons, the defendant therein had to stand or fall upon those reasons.

It is true that in this case the court, in *dictum,* says:

> "The general denial of all liability would not meet the requirements of its (insurer's) obligation under the policy to designate the different articles for which it disclaimed liability. *Victoria Park Co. v. Continental Ins. Co.,* 50 Cal. App. 609, 195 Pac. 951.)"

The *Victoria Park Company* case, which we have just discussed, certainly does not support this statement since in it, as we have seen, there was no denial of liability, but merely a statement that a certain item was "criticised." The *Lauman* case itself merely holds that when a denial of *liability* is specifically placed upon certain specific grounds then *liability* on the policy cannot be avoided on other and different grounds. Even in the quoted *dictum* the court does not say that a general disagreement with the *amount* of loss claimed in a proof of loss or a general statement that the insurer does not admit any loss on any of the items is insufficient. The intimation in both cases is that such a general statement, if made without limiting qualification, is in fact sufficient.

We submit, however, that the Notice of Disagreement given by the defendant in the present case is not a mere notice of general disagreement, but is as specific as it can be made by the English language. We will repeat the wording of the Notice of Disagreement, adding italics:

> "You are hereby notified the amount of loss which the company admits *on each or all* of the items specified in said preliminary proof of loss is *nothing.*
>
> * * * You are further notified that the undersigned *does not admit* that you suffered *any loss on each or any* of the different articles or on *each or any* of the different properties set forth in said preliminary proof of loss." (Italics added.)

## VI.

## Failure to Request an Appraisal.

While this point is mentioned in the petition, it is not referred to in the brief in support thereof. Probably it must, therefore, be deemed waived. However, we will briefly discuss it.

It is true that the policy provides that if the parties fail to agree upon the amount of loss, the company shall demand in writing an appraisement. However, the policy does not set forth any penalty to be incurred by the company for failure so to do, except that such appraisement ceases to be a condition precedent to the bringing of suit by the insured[Tr. p. 35]. There is no provision whatever in the policy that a failure to demand the appraisement will establish the loss as the amount claimed in the proof of loss or will deprive the company of any defense it would otherwise have, except that of petitioner's suit being premature. On the other hand the policy expressly provides [Tr. p. 35]:

> "If for any reason not attributable to the assured . . . appraisement is not had . . . the insured . . . may prove the amount of his loss in an action brought without such appraisement."

If the failure of the company to request an appraisement conclusively established the amount of the assured's loss, there would be no necessity for the assured to prove such loss in an action on the policy.

Petitioner has cited no authority in support of its contention. None such exists. On the other hand, the authorities cited by the Circuit Court of Appeals definitely hold that a failure to demand an appraisal under such a policy does not prevent the insurer from contesting the amount of loss claimed by the insured.

## VII.
## Loss of Profits.

Petitioner says, page 16 of its brief, "not being responsible for the ambiguity which undoubtedly lurks in the language of the policy . . ." There is no ambiguity in the policy and petitioner does not even attempt to point out any claimed ambiguity. In fact the Circuit Court of Appeals refers to the policy as "clear and direct in its terms." For the first five months of Petitioner's operation, prices rose and so did its profits. Then came the break in the market. Prices then dropped for three months and so did petitioner's profits, until in August they were negligible, even without a deduction for depreciation. They resulted in a substantial loss if depreciation is considered [R. 68, 274, 345]. Production costs remained practically constant. Then came the fire. During the three months suspension period following the fire, prices were even lower than for the three months immediately preceding it.

Under these circumstances the Circuit Court of Appeals held that the profits made before the break in the market were not determinative of the profits that would have been made after the break and while the much lower prices were still prevailing.

We submit that the decision of the Circuit Court of Appeals is so obviously correct that no further elaboration of the point is required.

## VIII.
## Depreciation.

Petitioner's argument on this point is quite in keeping of the remainder of its argument.

With reference to depreciation for the eight months before the fire, which would *decrease* its profits, petitioner refers to the testimony of its president that "We felt that $3,034.93 would represent the depreciation" for those eight months. Petitioner's books show that it charged off $23,079.59 for depreciation for these eight months [R. 272-273].

With reference to the claim for depreciation on the same property after the fire had partially destroyed it and which petitioner claims would *increase* the amount coming to it under Item II of the policy, petitioner claims that the depreciation for those same eight months had been $23,079.59 and, apparently, contends that the same depreciation would continue during the suspension period (Brief p. 19). Petitioner's books show it charged off for depreciation for the entire three months of the suspension period, the total sum of $356.66.

Before the fire, Petitioner contends the depreciation was very small, while its own books show it to have been large. After the fire Petitioner contends the depreciation was large (in fact much larger than before the fire) while its books show it to have been almost negligible.

We have already considered in Subdivision I(b) of this brief, the actual holdings of the Circuit Court of Appeals

with reference to depreciation and its reasons therefor. To save needless repetition we will respectfully refer this court to that portion of this brief in answer to the concluding pages of respondents' brief.

WHEREFORE, it is respectfully submitted that the Circuit Court of Appeals decided no novel or important question of law, whether in conformity or not, with local law, but merely passed on the sufficiency of the evidence to sustain certain conclusions made by the trial court; that no reason exists why the present petition for Writ of Certiorari should be granted; and that said petition should be denied.

Respectfully submitted,

WALTER O. SCHELL,
*Attorney for Defendant and Respondent.*

GERALD F. H. DELAMER,
*Of Counsel.*

Service of the within and receipt of a copy thereof is hereby admitted this.....day of January, A. D. 1945.

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